

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

Forbearance from Applying Provisions of the )  
Communications Act to Wireless )  
Telecommunications Carriers )

WT Docket No. 98-100

To: The Commission

COMMENTS AND  
PETITION FOR FURTHER NOTICE OF PROPOSED RULEMAKING OF  
THE RURAL TELECOMMUNICATIONS GROUP

RURAL TELECOMMUNICATIONS GROUP

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## **Summary**

The Rural Telecommunications Group ("RTG") requests that the FCC forbear from enforcing Sections 203, 204, and 205, 211, 212, 214, and 251(b)(1)-(3) of the Communications Act of 1934, as amended ("the Act") against wireless carriers generally and against Local Multipoint Distribution Service ("LMDS") and other fixed wireless local loop and data service providers specifically. Such forbearance is justified in light of the stiff competition which these carriers face in the market for local exchange and data services.

At a minimum, the Commission should forbear from enforcing these provisions against rural wireless providers as a class. Forbearance from enforcement of these provisions will foster competition in rural areas, and encourage deployment of advanced services to rural areas as required by Section 706 of the Telecommunications Act 1996 ("1996 Act"). The Commission should define "rural wireless provider" by modifying the definition of "rural telephone company" contained in Section 3(37) of the Act and, in the alternative, by defining a rural wireless service area based on population density characteristics.

The Commission should issue a Further Notice of Proposed Rulemaking seeking comment on forbearance from enforcement of these specific provisions.

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**COMMENTS AND  
PETITION FOR FURTHER NOTICE OF PROPOSED RULEMAKING OF  
THE RURAL TELECOMMUNICATIONS GROUP**

The Rural Telecommunications Group ("RTG"), by its attorneys, hereby respectfully submits these comments in response to the *Notice of Proposed Rulemaking* ("NPRM") released by the Federal Communications Commission ("FCC" or "Commission") on July 2, 1998 in the above-captioned proceeding.<sup>1</sup> RTG requests that the FCC forbear from enforcing Sections 203, 204, 205, 211, 212, 214, and 251(b)(1)-(3) of the Communication Act of 1934, as amended ("the Act") against wireless carriers generally and against Local Multipoint Distribution Service ("LMDS") and other fixed wireless providers of local loop and data services specifically. At a minimum, the Commission should forbear from enforcing these provisions against rural wireless

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<sup>1</sup> The *NPRM* was released in conjunction with the Commission's decision *in re* Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services; Biennial Regulatory Review--Elimination of Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-134, WT Docket No. 98-100 (rel. July 2, 1998).

providers as a class.<sup>2</sup> Forbearance from enforcement of these provisions will foster competition in rural areas, and encourage deployment of advanced services to rural areas as required by Sections 309(j) and 706 of the Telecommunications Act 1996 ("1996 Act"). The Commission should issue a Further Notice of Proposed Rulemaking ("*FNPRM*") seeking comment on forbearance from enforcement of these provisions.

## **I. STATEMENT OF INTEREST**

RTG is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Service ("PCS"), and Multichannel Multipoint Distribution Service ("MMDS") to their subscribers. Many of RTG's members also hold LMDS licenses and intend to use LMDS to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas.

## **II. DISCUSSION**

Pursuant to Section 10 of the Act, the Commission may forbear from applying a regulation or provision of the Act to any class of telecommunications carrier or service in any or

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<sup>2</sup> As discussed in Section II. B *infra*, RTG proposes a definition of rural wireless provider based on the definition of a rural telephone company contained in Section 3(37) of the Act, 47 U.S.C. § 153, and based on the population density of the area served.

some geographic markets if the Commission determines that: (1) the regulation or provision is not necessary to ensure that charges, practices, classifications or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and, (3) forbearance from imposing the regulation or provision serves the public interest.<sup>3</sup> In making the public interest determination, the FCC must specifically consider the affect of forbearance on competition, and a Commission determination that such "forbearance will promote competition among providers . . . may be the basis for a Commission finding that forbearance is in the public interest."<sup>4</sup>

Pursuant to its forbearance authority under Section 332(c) of the Act, the Commission has previously determined that forbearance from the application of Sections 203, 204, 205, 211, 212 and 214 of Title II of the Act to services classified as CMRS is in the public interest.<sup>5</sup>

Because the forbearance authority of Section 10 of the Act is more broad than that of Section 332(c), the Commission now seeks comment on whether to extend forbearance pursuant to Section 10 of the Act to wireless carriers other than Commercial Mobile Radio Services ("CMRS") carriers in order to "promote their [non-CMRS carriers] role in providing competition in the local exchange market."<sup>6</sup>

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<sup>3</sup> 47 U.S.C § 160(a).

<sup>4</sup> 47 U.S.C § 160(b).

<sup>5</sup> See *NPRM* ¶ 111.

<sup>6</sup> *NPRM* ¶ 114. The *NPRM* primarily seeks comment on forbearance of the provisions of Section 226 of the Act, also referred to as the Telephone Operator Consumer Services Improvement Act ("TOCSIA"). Because of the limited discussion in the *NPRM* regarding forbearance of provision other than TOCSIA (a mere five paragraphs), and because of RTG's limited resources, RTG has not attempted a lengthy factual showing in support of each specific

As discussed below, because of the competitive nature of wireless services, the Commission should forbear to the maximum extent possible, consistent with Section 10 of the Act, from enforcing any provision of the Act or of the Commission's rules against wireless providers in general that are inconsistent with a competitive environment. Specifically, pursuant to the forbearance authority of Section 10 of the Act, it is appropriate for the Commission to forbear from enforcing against LMDS licensees and other fixed wireless providers seeking to provide competitive wireless data and local loop service,<sup>7</sup> those provisions for which the Commission has previously found forbearance to be appropriate for CMRS. In addition, the Commission should forbear from enforcing certain provisions of Section 251(b) against LMDS providers and other wireless competitive local loop and data service providers.

At a minimum, the Commission should extend forbearance from enforcement of these provisions to rural wireless providers. Such forbearance is necessary in order to promote competition not only in the local exchange market, but also to ensure the deployment of broadband and other advanced telecommunications services to rural areas as required by Section 706 of the 1996 Act. Although RTG supports forbearance for all wireless providers, its

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statutory provision for which it seeks forbearance, nor has RTG attempted to compile an exhaustive list of provisions for which forbearance would be appropriate. RTG anticipates that if the Commission is seriously considering providing wireless carriers with regulatory relief through forbearance, the Commission will issue a Further Notice of Proposed Rulemaking further examining the Act and proposing forbearance from enforcement of specific provisions of the Act.

<sup>7</sup> These include CMRS licensees offering "fixed" local exchange service over CMRS spectrum and MMDS licensees offering two-way services if the Commission authorizes such use of MMDS.

comments are directed to rural LMDS licensees and rural providers of fixed wireless local loop and data services.

**A. The Commission Should Forbear from Enforcing Various Provisions of Title II Against LMDS Providers and Other Wireless Local Loop and Data Service Providers.**

When the Commission auctioned the LMDS spectrum, it recognized that LMDS, specifically the A Block license, by virtue of its vast amount of spectrum, was uniquely situated to provide competition to incumbent local exchange companies ("ILECs") and incumbent cable companies. For this reason, the FCC specifically limited the eligibility of incumbents to own attributable interests in A Block LMDS licenses that significantly overlapped their existing service area.<sup>8</sup> As a direct result of the FCC's in-region eligibility restriction, each A Block licensee will face stiff competition from an ILEC and possibly from other Competitive Local Exchange Carriers ("CLECs") if the LMDS licensee offers telephony, and from one or more multichannel video programming distributors ("MVPDs") if the LMDS licensee offers video programming. LMDS licensees also face competition from other wireless licensees (many of whom did not have to pay for spectrum) in the 24 GHz and 39 GHz bands and potentially from a host of other competing wireless providers using varying technologies. Finally, there are two LMDS licensees in each Basic Trading Area ("BTA") which are potential competitors in the market for some service offerings.

A Block LMDS licensees utterly lack market power, and enforcement of Sections 203, 204, 205, 211, 212 and 214 of Title II (to the extent that these provisions apply) is unnecessary to

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<sup>8</sup> 47 C.F.R. § 101.1003(a). This restriction on ownership is referred to as the "in-region" eligibility restriction."



ensure that charges and practices of LMDS providers are just, reasonable, and not unjustly or unreasonably discriminatory.<sup>9</sup> Because LMDS licensees face tremendous competition, they lack the ability to charge unreasonable rates or to unreasonably discriminate in the provision of their services. Because of the intense competition which they will face, LMDS providers are expected to offer customers more and better service than that of the ILEC. Accordingly, LMDS providers lack an incentive to engage in behavior that is harmful to consumers, and enforcement of the above provisions is not necessary to protect consumers.

Finally, forbearance from enforcing Sections 203, 204, 205, 211, 212 and 214 of Title II serves the public interest.<sup>10</sup> LMDS licensees, both A and B Block, face tremendous technical, financial and competitive hurdles. At this time, it is questionable whether LMDS can even be deployed to rural areas economically. Because of the line-of-sight ("LOS") propagation limitations of the 28 GHz band, and because of the short radius of hub spacing (less than two miles depending on modulation techniques), LMDS will be staggeringly expensive to deploy. In order to realize the hope of competition by LMDS in the local telephony and video distribution markets, the Commission must adopt the least burdensome, least costly regulatory structure possible for LMDS. By reducing the regulatory costs imposed on LMDS licensees, the FCC will

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<sup>9</sup> The Commission has defined market power as "the ability to raise prices by restricting output" and "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable." *See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof*, 95 F.C.C. 2d 554, 558 (1983) ("*Competitive Carrier Fourth R&O*").

<sup>10</sup> 47 U.S.C § 160(a).

be promoting competition among providers as well as encouraging the deployment of broadband services,<sup>11</sup> thus rendering forbearance in the public interest pursuant to Section 10(b) of the Act.<sup>12</sup>

Although an incumbent provider may hold an in-region B Block LMDS license, this fact does not alter the need for forbearance from enforcement of the above listed provisions for B Block licensees. It is widely recognized that the smaller B Block license cannot be used to provide the full range of services that the larger A Block license will support. B Block licenses will most likely be used to provide niche services. The B Block is not a substitute for the A Block and the B Block licensee will lack the power to behave in an unreasonable or discriminatory manner. As noted above, B Block licensees must still operate in a highly competitive market. In addition, although the A and B Blocks are not perfect substitutes, RTG anticipates that A and B Block licensees will compete in some services, and accordingly, should be regulated in a like manner. Finally, the LMDS industry as a whole is barely older than conception. No one knows what services will eventually evolve. The Commission should adopt

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<sup>11</sup> In a recent statement regarding the implementation of section 706 of the 1996 Act, Chairman Kennard stressed the importance of bandwidth capacity as a means of bridging the "digital divide" between the information haves and have-nots. The Chairman stated, "Our goal is to promote the deployment of broadband services to all Americans, *including rural consumers, who might otherwise be left behind their urban counterparts in the receipt of such services....* We must continue to promote the deployment of bandwidth in a pro-competitive manner consistent with our historical national commitment to universal service." Statement of Chairman William E. Kennard Re Section 706 of the Telecommunications Act of 1996 and Bandwidth, Released April 22, 1998 (emphasis added).

<sup>12</sup> The above arguments apply equally to wireless local loop and data service providers in general. These providers face tremendous competition and economic challenges, and generally lack the ability to engage in unreasonable practices.

a regulatory framework that imposes the minimum burden and restraint on this developing industry.

In addition to the provisions of the Act for which the Commission has previously found forbearance justified for CMRS, the Commission should forbear from enforcing the provisions of Section 251(b)(1)-(3) of the Act against LMDS licensees and other wireless local loop and data service providers. Section 251(b)(1) prohibits local exchange carriers (LECs) from prohibiting or limiting resale of their telecommunications services. Because LMDS providers and wireless local loop and data service providers lack market power, they lack incentive to unreasonably restrict resale. Any isolated abuses that occur may be dealt with under Sections 201, 202 and 208 of Act. The enforcement of Section 251(b)(1) as applied to LMDS licensees is also unnecessary for the protection of consumers. A resale requirement in general does not address consumer protection concerns. Finally, forbearance from enforcement of the resale provision is in the public interest because it will promote competition between providers. RTG anticipates that many LMDS licensees will offer high-speed data and advanced telecommunications services. By forcing them to resell such services, the Commission may remove the incentive to innovate. Forbearance from enforcing the resale provision will also encourage the deployment and construction of additional competitive facilities-based systems.

In addition to forbearing from enforcing Section 251(b)(1), the Commission should forbear from enforcing subsections 251(b)(2) and (3) of the Act against LMDS licensees and other wireless local loop and data service providers. These subsections require local exchange carriers to provide number portability and dialing parity. RTG notes that CMRS providers are

not subject to equal access requirements,<sup>13</sup> and that the Commission is currently considering forbearing from enforcing number portability requirements against CMRS providers.<sup>14</sup> In the *FNPRM*, the Commission should seek comment on the ability of and cost to LMDS providers and other wireless local loop and data services providers to comply with the number portability and dialing parity requirements of Subsections 251(b)(2) and (3). In the absence of market power, the enforcement of these provisions against LMDS licensees and other wireless local loop and data service providers is unnecessary to prevent unreasonable discrimination or to protect consumers, and enforcement may hamper competition and innovation.

**B. At a Minimum, the Commission Should Forbear from Enforcing Various Provisions of Title II Against Rural Wireless Providers**

The Commission wisely seeks comment on whether there are types or classes of wireless providers upon whom the disproportionately high cost of complying with regulation yields no corresponding public benefit. Rural wireless providers are such a class, and even if the Commission does not forbear from enforcing the above-referenced provisions against all LMDS licensees and other providers of local loop and data services, it should forbear from enforcing the provisions against rural wireless providers. RTG has previously advised the Commission that the cost of government regulation of CMRS carriers falls more heavily on rural wireless providers than on large wireless carriers. These rural wireless providers have neither the economies of scope to absorb such FCC-imposed costs nor a large subscriber base over which to

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<sup>13</sup>See *NPRM* ¶ 79 (CMRS carriers not required to provide equal access to common carriers for the provision of telephone toll service).

<sup>14</sup> See Petition for Forbearance filed by the Cellular Telecommunications Industry Association ("CTIA Forbearance Petition"), filed December 16, 1997 in CC Docket No. 95-116.

spread the cost of compliance.<sup>15</sup> Therefore, rural wireless providers (both CMRS and non-CMRS) must raise their rates consistent with the compliance costs imposed upon them, much to the dissatisfaction of their subscribers and to the detriment of competition. The disproportionate cost will make it especially difficult for rural wireless providers to compete with the heavily subsidized landline carriers.

Forbearance for rural wireless providers will also serve the public interest because it will encourage such rural providers to deploy advanced communications services to rural areas as mandated by Section 706 of the Act. Rural wireless providers, without expensive and outdated plant in the ground, may be in the best position to provide advanced services to rural areas. These providers, particularly LMDS and MMDS providers, should be able to offer broadband services to rural areas in a more timely manner than incumbents with buried copper.

Accordingly, the Commission should forbear from enforcing various provisions of the Act and of the rules against rural wireless providers as a class. The Commission should forbear from enforcing Sections 203, 204, 205, 211, 212, 214 and 251(b)(1)-(3) of Title II of the Act (to the extent that these provisions apply) to rural wireless providers. As noted above, these comments are not intended to provide comprehensive support for forbearance from each of the specific referenced statutory provisions nor is the list of provisions exhaustive. Instead, RTG

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<sup>15</sup> See, e.g., June 16, 1998 Letter to William Kennard from RTG regarding 1998 regulatory fee assessment in the CMRS category. RTG characterizes the onslaught of fees, taxes, surcharges, and regulatory-related costs imposed on wireless carriers as "government profit chipping." Such fees, taxes and surcharges include disproportionately high annual CMRS regulatory fees and contributions to universal service funds from which wireless providers will never realistically receive support.

envisions that the Commission will release an *FNPRM* seeking specific factual support for forbearance from enforcement of specific provisions.

The Commission should define the class of rural wireless providers using a modified version of the definition of a rural telephone company contained in Section 3(37) of the Act and alternatively, based on population density characteristics, as follows:

The term "rural wireless provider" means any provider of local exchange or data services that provides such service by radio communications and:

- (A) provides common carrier service to any license area that does not include either—
  - (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of Census; or,
  - (ii) any territory, incorporated or unincorporated included in an urbanized area, as defined by the Bureau of Census as of August 10, 1993;
- (B) provides common carrier service to fewer than 50,000 wireless loops in any area that does not include a Metropolitan Statistical Area ("MSA"), or any part thereof; or
- (C) provides common carrier service to any license area that does not exceed a population density of \_\_\_\_ POPs per square mile, based on the most recently available population statistics of the Bureau of Census.

This definition will be easy to administer, and will help the Commission encourage the deployment of advanced services to rural areas. Although RTG proposes the use of population density as one of the definitions of a rural wireless provider, RTG has not yet conducted a thorough analysis to determine what density figure is appropriate. Accordingly, in the *FNPRM*, the Commission should seek comment on what density characteristics most accurately reflect the "rural areas" for which Congress expressed particular concern in Section 309(j)(3)(A) and (4)(B) of the Act and what population density per square mile should be used to define rural wireless provider.

**C. In Striving for A Goal of Regulatory Parity, the Commission Should Strive for Less Regulation Instead of More.**

Although recognizing that the Act gives the Commission authority to regulate different providers differently, the Commission seeks comment on how forbearance for particular types of providers comports with the goal of regulatory symmetry.<sup>16</sup> Although RTG applauds the Commission's consideration of the need for regulatory parity, as new technologies develop and new services are deployed, thereby introducing competition into previously monopolistic markets, the Commission and the communications industry must work to ensure that the weight of government regulation and interference is lifted for all companies, new and old, rather than shackling new technologies with unnecessary regulation forged in a different era. The Commission should not apply unnecessary regulations to new technologies merely to provide "regulatory symmetry." Instead, the Commission should refrain from regulating new providers to foster competition, and then, once competition is introduced, the Commission may lessen the regulatory burden on incumbent providers.

### **III. CONCLUSION**

Wireless providers operate in a highly competitive and rapidly evolving environment. Enforcement of many of the provisions of Title II of the Act against wireless providers is not necessary to ensure reasonable charges or practices or to protect consumers. Forbearance from enforcing many of the provisions of Title II will foster competition in the telecommunications market and is therefore in the public interest. The Commission should forbear from enforcing

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<sup>16</sup> *NPRM* ¶ 117.

unnecessary Title II provisions against LMDS providers and other wireless providers of local loop and data services. At a minimum, the Commission should forbear from enforcing unnecessary Title II provisions against rural wireless providers. In order to develop a complete factual record, the Commission should issue a further notice of proposed rulemaking proposing forbearance from enforcement of the specific Title II provisions outlined above.

Respectfully submitted,

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